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# In The
# Supreme Court of the United States

**OCTOBER TERM 1954**

## No. 191

NATURAL GAS PIPELINE COMPANY OF AMERICA,
*Appellant,*

VERSUS

PANOMA CORPORATION, and THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,
*Appellees.*

## BRIEF OF APPELLEES

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**BRIEF OF APPELLEES**

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**FOREWORD**

Herein the appellant, Natural Gas Pipeline Company of America will be referred to as "Natural"; the Corporation Commission of the State of Oklahoma will be referred to as "Commission", and Panoma Corporation will be referred to as "Panoma".

In December of 1946, the Corporation Commission of Oklahoma entered its Order number 19514, directing that no natural gas be taken from the Guymon-Hugoton Field at less than 7¢ per thousand cubic feet. Cities Service Gas Company appealed the order to the Supreme Court of Oklahoma. From a decision affirming[1], an appeal was taken to this Court, where it was again held valid[2]. Thereafter, Panoma, as a gas producer in the subject field, filed an application with the Commission seeking the Commission's conclusion as to whether or not the sale of natural gas to Natural, under the terms of the contract between the two companies complied with or violated Order number 19514.

In May of 1951, the Commission issued its Order number 24745 (R. 81), determining that under the facts proven, Panoma was not complying with the basic order. This cause involves an appeal from the Supreme Court of Oklahoma affirming that order of interpretation and enforcement[3]. The only parties hereto are Natural, Panoma and the Commission.

In July of 1952 (more than six years after the first such order), on the application of about five hun-

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[1] Cities Service Gas Co. v. Peerless Oil and Gas Co., 203 Okl. 35, 220 P. 2d 279.

[2] Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U. S. 179.

[3] Natural Gas Pipeline Co. of America v. Panoma Corporation, 271 P. 2d 354.

dred land and mineral owners in Texas County, the Commission issued its Order number 29096 raising the minimum value of gas taken from the Guymon-Hugoton field from 7¢ to 9.8262¢ per thousand cubic feet and prescribing a more definite formula to use in determining the question of whether or not such value had been realized.

An appeal was taken from that Order to the Supreme Court of Oklahoma by three of the pipe line companies purchasing gas in that field, one of which was Natural. From an adverse judgment by the Supreme Court of Oklahoma[4], all of the pipe line companies have appealed to this Court. Cause No. 321 is Natural's appeal involving the Commission's order increasing the minimum price for produced gas.

Appellant has elected to brief this appeal jointly with the appeal taken in Cause No. 321, in part supporting their contentions in each cause by reference to the record in the other. Since the Commission's orders involved are different orders, are based on different evidence and affect different parties represented by different counsel, the appellees have elected to brief this appeal separately.

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[4] Natural Gas Pipeline Co. v. Corporation Commission, 272 P. 2d 425

## STATUTES INVOLVED

The state statutes in question, as that term is defined by Title 28 U. S. C., Section 1257 (2), are Commission's Orders number 19514 (R. 127), and number 24745 (R. 81). Appellant advances in support of its argument Art. 1, Sec. 8, Cl. 3, th Commerce Clause of the Federal Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the Natural Gas Act (15 U. S. C. 717, *et seq.*).

## QUESTIONS PRESENTED

**1. Whether or not a judicial determination that certain companies operating in the Guymon Hugoton gas field are natural gas companies, and as such, subject to the jurisdiction of the Federal Power Commission, destroys a prior state order fixing the minimum price at which natural gas may be produced.**

**2. Whether or not the orders of the Commission enforcing the minimum price regulation as approved by this court violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.**

## STATEMENT OF THE CASE

### THE APPLICATION

These proceedings were commenced by the filing with the Commission of an application by Panoma (R. 11-12), showing:

1. That it owned producing gas wells within the common source of supply covered by a previous order of the Commission fixing a minimum field price for gas produced at 7¢ per thousand cubic feet, metered at 14.65 pound absolute pressure per square inch.

2. That Natural, since the effective date of the order entered on the 9th day of December, 1946, has continued to receive gas from the applicant and has paid therefor a sum less than the price fixed by the Commission's order.

3. That notwithstanding the fact that the order is applicable to said gas, Natural had refused to make payment therefor in accordance with the terms of said order.

4. That Panoma did not desire to continue to deliver its gas in violation of the order, and requested the Commission to determine: First, whether or not its deliveries are in violation of the order; and Second, whether or not it should discontinue such deliveries if the same are in violation of the order.

Notice was given and the application set for hearing on the 14th of February, 1951 (R. 12-13).

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## THE RESPONSE

Thereafter, Natural filed its response (R. 16), alleging:

1. That it was a natural gas company within the meaning of the Natural Gas Act of 1938.

2. That it could not transport and market gas in the condition it was produced from the wells but first must remove certain hydrocarbons therein contained and reduce the moisture content.

3. That on December 1, 1946, Natural, as purchaser, entered into a written contract with certain individuals under the firm name of Harrington and Marsh, as sellers, agreeing to buy a daily average of 76,000 m.c.f.

4. That Harrington and Marsh agreed to construct a gasoline plant and a dehydration plant and operate the same to remove from the raw gas as produced from the wells all hydrocarbons and water to a dew point which would not exceed a temperature of 25° Fahrenheit at a pressure of not more than 785 pounds per square inch in order that the formation of hydrates and/or the condensation of hydrocarbons would not occur in Natural's pipe line system.

5. That sellers were authorized to extract from the raw gas certain hydrocarbons if such did not reduce the heating value of the hydrocarbons remaining in the gas below 950 British Thermal Units per cubic foot.

6. That in the event sellers failed to operate their gasoline and dehydration plant in accordance with such agreement, Natural was authorized to take possession thereof and operate the same for the account of the sellers, market the production therefrom, and account to sellers for the receipts.

7. That under such contract sellers were required to deliver the natural gas produced by it *into the custody of Natural on the suction side of Natural's compression station*[5], and after compression, Natural was required to redeliver such gas to sellers' gasoline plant.

8. That after the treatment of such gas and the extraction of hydrocarbons and dehydration sellers were required to deliver the dehydrated residue into Natural's pipe line at the outlet of such plant.

9. That Panoma, as successor in interest of Harrington and Marsh, realizes through the sale of liquid hydrocarbons extracted at such plant from the natural gas produced from the leases and the payment from Natural for the residue gas, the equivalent of more than 7¢ per thousand cubic feet, measured at 14.65 pounds pressure and was, therefore, complying with the previous order of the Commission as interpreted by the opinions of the Supreme Court of Oklahoma and the Supreme Court of the United States.

10. That if the orders were construed as requiring Panoma to realize for the gas delivered to Natural the sum of 7¢ per thousand cubic feet without giving consideration to the sums received by Panoma from the sale of the other hydrocarbons taken from such natural gas, or if the Commission should require Panoma to cease

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[5] Throughout this brief, emphasis is supplied, unless otherwise noted.

deliveries to Natural, the same would be discriminatory, arbitrary and void, and violative of Sections 7 and 15 of Article II of the Constitution of Oklahoma and the Fourteenth Amendment to the Constitution of the United States, and would impose a discriminatory and unlawful burden upon Interstate Commerce contrary to the provisions of Section 8 of Article I of the Constitution of the United States.

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## THE COMMISSION'S ORDER

After a hearing, the Commission, on May 17, 1951, entered its order (R. 81-87), requiring and finding:

1. That Natural, within twenty days from the date thereof, pay unto Panoma the difference between the amount which it had paid Panoma and the amount Panoma was entitled to receive for gas delivered so that the total amount paid for gas delivered during the period covered by such payments would equal 7¢ per thousand cubic feet for the amount of gas delivered to Natural's compressor station, measured at a pressure base of 14.65 pounds absolute pressure per square inch.

2. That if Natural does not do so within such time, Panoma is directed to forthwith cease delivering gas to Natural.

3. That Natural does not comply with the Commission's order by paying Panoma 6¢ per thousand cubic feet of gas for a part of the gas delivered, measured at a

pressure base of 16.5 pounds per square inch absolute pressure, and it is directed to desist from so doing and to comply with said order.

4. That Natural shall pay Panoma for gas delivered to its compressor station the sum of 7¢ per thousand cubic feet, measured at a pressure base of 14.65 pounds absolute per square inch.

5. That in the event of its failure to do so, Panoma is ordered to stop delivery of gas to Natural.

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## THE EVIDENCE BEFORE THE COMMISSION

Each of the parties agreed that the gas which Panoma delivered to Natural was being delivered pursuant to the provisions of the contract between the parties (R. 98-122). In substance, that contract provided:

That Panoma, as the owner of substantial gas leaseholds within the Guymon-Hugoton Field, would fully develop such leases and construct a gathering line from the wells, and through such gathering line deliver gas at a pressure of 150 pounds per square inch into the custody of Natural at the intake side of a compressor station to be erected and operated by Natural.

That Natural would then compress the gas to a pressure of approximately 800 pounds per square inch and redeliver it to Panoma at the intake side of a gasoline and dehydration plant which Panoma was to construct and operate.

That Panoma would dehydrate and deliquify the gas and redeliver it to Natural through a meter station operated by Natural. The extracted liquids were to become the property of Panoma unless Panoma breached its contract to properly operate the plant, in which case Natural was authorized to take over the plant operation. This contingent provision never became applicable.

The amount of gas delivered by Panoma to Natural at the compressor station was stipulated (R. 53). The amount of money which Natural had paid Panoma was not in dispute (R. 53). The amount of money which Panoma had realized from the sale of extracted liquids was an undisputed figure (R. 52). Further, there was no dispute as to the expenses incurred by Panoma in operating the gathering system and plant (R. 52-53, Exhibit 8, R. 96, and Exhibit 14, R. 135-139).

It was further shown that the cost to Panoma of dehydrating the gas and extracting the hydrocarbons did not include any allowance for earnings on investment in the plant or for interest in financing the plant or salaries to officers of the corporation (R. 54). That a ten percent plant earning is a minimum to entice investors into such type of operations (R. 63, R. 70), and that if such items were allowed, Panoma's deficiency from present gas sales and liquids would be 1.48¢ per thousand cubic feet of gas produced (R. 56).

The evidence was reviewed by the Oklahoma Supreme Court to determine whether or not it supported the Commission's findings. In part, the court's analysis of the evidence reads as follows:

> "Panoma contends, and there is evidence to support it, that proper calculation of the operating cost of processing the gas, with proper charge for depreciation of the plant, or proper cost amortization, with maintenance and replacement costs, would result in showing a loss, or little if any profit at all, and might very well at different periods show an actual loss; that in any event the amount of profit or loss would fluctuate over varying periods, and could not enter into such a calculation as that proposed by Natural, because it would result in different calculations over varying periods, and would result in Natural's paying one price in one period to bring the aggregate up to 7¢ and a different price over a different period to bring such aggregate up to 7¢. Thus Panoma points out that Natural would be operating upon a different pay basis for each month, or for each quarter or for each semi-annual or annual period. And Panoma takes the view that Natural in effect and in fact is the purchaser of natural gas from the gas wells and not merely a purchaser of part only of the gas produced.
>
> "We think a consideration of all of the provisions of the sale contract is necessary to decide this controlling question. We think the narrow view of Natural was properly denied by Commission. It seems well demonstrated by the overall plan that Natural, if not in fact purchasing all of the gas located in Panoma's gas reserve, was at least purchasing all of the gas actually produced and run into the primary line of Natural and thence to its compressor station. The temporary return of the gas to Panoma after Natural had compressed it was a cus-

tody or possession for a particular purpose, that is, to clean up or purify or process the rough gas for one purpose only, and that was to redeliver the gas in a stipulated condition to Natural. This processing may or may not have resulted in a profit to Panoma in the past, and it may or may not result in a profit to Panoma in the future. Nevertheless, that processing must be performed by Panoma. It is essential to Natural that it be done. The contract so provides, and in addition thereto the contract authorized Natural, in the event of unsatisfactory operation by Panoma, to take over the plant and operate it at the cost of Panoma plus 10% management expense.

"Panoma produced the rough gas and delivered it to Natural. Thereafter when Panoma received back the gas and processed it and redelivered it to Natural, we regard that as merely a detail of the overall plan of processing the gas in selling and delivering it to Natural. We notice the fact that it was metered on this second delivery and that the expression was used that title passed at that point, but we do not consider that in any sense controlling, if it is even material in deciding the controlling question.

* * * * * * * * *

"The contract provides that Panoma desires to sell Natural all the gas underlying its entire gas reserves; and that Panoma has completed a number of gas wells and will drill additional wells and install gathering lines, etc., and operate the entire production, all for the purpose of delivering gas to Natural; and that it is contemplated by both parties that all the gas underlying Panoma's acreage will be necessary to cover Natural's requirements and to fulfill the sale contract; and that all of the entire gas production of Panoma is reserved for deliveries under the contract; and that all of Panoma's gas reserve is dedicated to the purpose of this sale contract; and that none of such gas shall be marketed to any other person; and reference is made to Natural's

lien of dedication on Panoma's leaseholds themselves.

"These contract provisions tend strongly to support Commission's findings, and to indicate that in truth and in fact Natural bought and contracted to buy all of Panoma's natural gas in the ground and to be produced from under this 78,000 acres, and that all provisions for drilling, producing, piping, compressing, processing, metering, etc., were merely details of delivery to Natural of that which it had already bought.

"We therefore agree with the conclusion of Commission that Natural purchased and took natural gas from this reservoir at less than 7¢ per thousand cubic feet wellhead price. The extent thereof was in the amount stipulated and therefore found by Commission" (271 P. 2d 360-361).

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## NATURAL'S POSITION

From the order of the Commission in the case at bar Natural appealed to the Supreme Court of Oklahoma. The order was affirmed, 271 P. 2d 354. A copy of the opinion is found in the Record at pages 149-169.

After the Supreme Court had denied a petition for rehearing (R. 169-173), and issued its order allowing an appeal (R. 174-175), Natural lodged this appeal, alleging (R. 178), that as it purchased residue gas (as distinguished from natural gas), for immediate transportation to other states, that the challenged order of the Commission violated the Commerce Clause of the Federal Constitution, and as a second point, that the chal-

lenged order denied it the equal protection guaranteed by the Constitution, in that Phillips Petroleum Company, by the Commission's Order No. 19702[6], was allowed to sell gas under similar circumstances.

Other issues were raised by the assignments of error and prayer for reversal, but were not urged in appellant's brief.

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## SUMMARY OF THE ARGUMENT

*Cities Service Gas Company* v. *Peerless Oil and Gas Company*, 340 U. S. 179, 181, we think settles all of the commerce questions advanced by appellant, unless the record does not support the conclusion that it is purchasing natural gas, or unless the Commission's order extended state regulations beyond the production and gathering of gas. It will be demonstrated that the Commission's order herein challenged does no more than make the Commission's fieldwise order[7] applicable to Natural in the manner contemplated by this Court in the *Cities Service* opinion.

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[6] The order is shown (R. 139-143). The proceedings leading up to the issuance of that order are not a part of the record herein.

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[7] Commission Order No. 19514, Record 134:

"1. That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton field in Texas County, Oklahoma, at a price, at the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch."

As a second proposition, we will show that the order thus construed does not violate the Equal Protection Clause of the Fourteenth Amendment.

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## ARGUMENT AND AUTHORITIES

### I.

**The determination that certain companies operating in the field are natural gas companies subject to the jurisdiction of the Federal Power Commission does not destroy state regulation of the production of natural gas.**

The validity of the basic order of the Commission fixing a minimum price of gas at 7¢ per thousand cubic feet is no longer open to question. *Cities Service Gas Company* v. *Peerless Oil & Gas Company*, 340 U. S. 179.

In that case it was contended that the Commission acted beyond its authority; that the statutes of the state, if construed to permit price fixing, violated the state constitution; that the statutes and the order of the Commission violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment in that there was no evidence of physical waste; that the statutes contained no adequate standards governing Commissioners' powers; that the orders are too vague; that the proceedings lacked procedural due process; that the specific order discriminated against Cities Service; that the general order applying only to the Guymon-Hugoton field dis-

criminated against those producing or purchasing from that field.

It was further contended that the orders of the Commission violated the Commerce Clause, Article I, Section 8, of the Constitution in that they caused an undue burden upon and discriminated against interstate commerce.

The Oklahoma court held that the Commission's orders did not violate the Federal constitution. This Court agreed with the conclusion of the Oklahoma Court, and said at pages 185, 186 and 189 of the opinion:

> "The Due Process and Equal Protection issues raised by appellant are virtually without substance.
> * * * * * * * * *
>
> "The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. * * * It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce.
> * * * * * * * * *
>
> "We hold that on this record the Oklahoma Corporation Commission issued valid orders, and that the decision of the court below should be affirmed * * *."

It is now unquestioned that the fixing of a minimum price at which a depletable resource is taken from the earth is a useful tool in shaping a cradle of conservation therefor. A fair price exerts pressure against waste,

tends to prevent inefficient use, promotes maximum development, and extends operations to a period of greater reservoir exhaustion. At the same time, in regulating and protecting the interlocking rights of the owners of such reservoirs, ratable-take laws are brought into play, which laws in themselves become meaningless unless combined with minimum price legislation. State regulations designed for these dual purposes point toward authorized goals. In the *Cities Service* opinion you said (page 184-186):

> "These sections explicitly authorize the order requiring Cities to take gas ratably from Peerless and at a specific price. In 1915, Oklahoma strengthened its gas conservation laws by authorizing regulation of production of gas from a common source when production is in excess of market demand. 52 Okl. Stats., Secs. 239-240 (1941). The Commission was authorized to limit the gas taken by any producer to 'such proportion of the natural gas that may be marketed without waste' as the natural flow of gas at the wells of such producer bears to the total natural flow of the common source. In authorizing such regulation, the legislature declared that it acted 'so as to prevent waste, protect the interest of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another.' The Oklahoma Supreme Court construed the 1915 Act to permit the general order setting a minimum price in the field. It further ruled that economic waste was within the contemplation of the statute. Finally, with regard to state questions, it held that the orders did not violate the Oklahoma Constitution.

"The Oklahoma Court also concluded that the statutes so construed and the orders made thereunder do not violate the Federal Constitution on the grounds relied on by Cities Service. We agree.

"The Due Process and Equal Protection issues raised by appellant are virtually without substance. It is now undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas. This Court has upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking. *Champlin Refining Co. v. Corporation Commission*, (1932), 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, or to protect the economy of the state. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, (1940), 310 U. S. 573, 60 S. Ct. 1021, 84 L. Ed. 1368. These ends have been held to justify control over production even though the uses to which property may profitably be put are restricted. *Walls v. Midland Carbon Co.*, (1920), 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276."

Conservation is in the national interest and in the interest of all of us, whether living in or out of Oklahoma. No exception can be made of the customers of Natural. Its customers undoubtedly have as much interest both in the full utilization of gas already discovered and in the replacement of consumed gas through new reserves as do those of us who are not, but would like to become consumers of natural gas. Congress has said that the public, and that is all of us, both in and out of Oklahoma, are likewise interested in seeing that this most convenient and usable of fuels does not, by reason of its de-

sirability, command an exorbitant and unfair price when sold to the public, and so through the Natural Gas Act Congress has empowered the Federal Power Commission to limit the price for which gas may be sold for resale in interstate commerce. The authority vested in the Federal Power Commission does not, however, authorize any regulation of production and gathering[8].

Thus, we have unquestioned jurisdiction in both the state and federal governments to exercise their entrusted governmental function to protect and regulate, within the framework of their separate powers to regulate, at the opposite end of streams of natural gas.

The movement of natural gas in interstate commerce commences when it is jolted from repose in nature's rock and is continuous thereafter until it arrives at the burner tip. In the remote recesses of a reservoir, its movement is, of course, slow, but at an increasing pace it arrives at the well bore and thereafter never ceases its movement as it flows through the gathering lines into the compressors, thence to the dehydrators, and thence through long transmission lines to distribution lines, and through such to the burner tip.

To select any point on this stream and say that its interstate movement begins at that point would be a wholly artificial conclusion based on the application of

[8] The Natural Gas Act, 52 Stat. 821, 15 U. S. C. Sec. 717 provides in paragraph (b):

"The provisions of this chapter * * * shall not apply * * * to the production or gathering of natural gas."

some variety of rule established in relation to other commodities unlike gas. Undeniably, the state may regulate at the wellhead. Natural gas is already moving in interstate commerce when it arrives at the wellhead, and he who says to the contrary is blind to the truth. All state gas regulations in the interest of conservation and the protection of correlative rights are thus, in fact, imposed on gas moving in interstate commerce. It would seem that if such state regulations are to have substance, the only point in the movement of gas at which they may be broken off is after they have effectively accomplished the purpose for which they were enacted, whether this be at the wellhead, a half mile past the wellhead, at the point where gas enters a compressor station, leaves a compressor station, enters a dehydration plant or leaves a dehydration plant. The state's regulation relates to production. If gas is produced in violation of such regulation, it has been nonetheless unlawfully produced because it has passed a wellhead, a compressor station, or a processing plant.

When this Court considered the validity of the regulation now in question it recognized that the price regulation applied to all gas taken from the Guymon-Hugoton field.

> "The price regulation applies to all gas taken from the field, whether destined for interstate or intrastate consumers."
>
> *Cities Service* v. *Peerless*, 340 U. S. 188.

And in *Phillips Petroleum Company* v. *Oklahoma*, 340 U. S. 192, you said:

> "In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers or there is little point in regulating any."

Appellants therefore beg the question when they now contend that as they purchase *residue* gas the gas which they buy is not subject to state regulation. It is natural gas when it is first received by Natural. It is still natural gas, although dehydrated and deliquified when delivered to them the second time after it has passed through Panoma's plant. In fact, if it is not natural gas, appellants' primary contention is entirely without force, as the Natural Gas Act is limited in effect to the transportation and sale of natural gas. They can not say that the state's regulations which may be effective as to "the production or gathering of natural gas" have no effect because the product involved is not natural gas, and at the same time contend that the sale is exclusively governed by the Natural Gas Act because the product involved is natural gas being offered for resale in interstate commerce.

It seems then that the sole question is whether or not the language of the Commission's minimum price order, which this Court has already approved, is broad enough to encompass the gas which appellants purchased. Since no gas flows from the Guymon-Hugoton

field free of the Commission's order, and since it is conceded that Natural is buying natural gas, it would seem that the question almost answers itself. Since the Commission of Oklahoma is charged with the responsibility of making its order effective, its enforcement order must be sustained unless unreasonable or so devoid of supporting facts that it violates due process. *Nebbia* v. *People of the State of New York*, 291 U. S. 502, 516; *Snowden* v. *Hughes*, 321 U. S. 1, 8, 9, 10, 11.

When the gas in question flowed through the wellheads of Panoma its destiny for interstate commerce did not invalidate Oklahoma regulations in respect thereto. At the time the gas passed the wellhead no change of title took place, or any other act occurred which would enable the producers thereof to say to the Commission: "I have complied with your regulations; my gas is now free of your charge and I may do as I wish with it." The gas thus still charged with Oklahoma's regulations was delivered into the custody of Natural, and the gas, still charged with such regulations, was by Natural compressed and redelivered to Panoma. Panoma extracted therefrom the liquids (portions of which were salable), and again redelivered the gas to Natural.

Did Oklahoma regulations lose their force at the wellhead? In the compressor? In the scrubber? In the condenser? At Panoma's meter station? Where along this route in the circumstances before it, could the Corpora-

tion Commission of Oklahoma say that its orders had been complied with and the gas, or those who had its custody, relieved from any further necessity of compliance with such orders? Was it unreasonable for the Commission to hold that by such delivery Panoma parted with custody of the gas without receiving 7¢ therefor and that it was not complying with the Commission's order even though it thereafter, as the operator of a processing plant, realized additional sums which, in gross, if added to the gas price, would equal 7¢ per thousand cubic feet?

Moreover, was it unreasonable or discriminatory for the Commission to find that even if the operation of such plant be taken into consideration that there was no evidence that the reasonable profits from such operations would offset the deficiency in the price received for the gas taken from the formation? The language of the Commission's original order was not unreasonably applied or misinterpreted in the Commission's enforcement order which is the subject of the instant appeal. Its basic fact conclusions are supported by the record and this Court should not now impose its judgment in the internal administrative affairs of the State of Oklahoma. Such would be the effect of a reversal. *Nebbia* v. *People of the State of New York*, *supra*, 291 U. S. 502, 516.

But appellant says, in effect, that even if the foregoing analysis be correct, that the original, or basic 7¢

order must now fall because of the decision in *Phillips Petroleum Company* v. *Wisconsin*, (1954), 347 U. S. 672. The Phillips decision, as we understand it, holds that on the facts before the Federal Power Commission, Phillips Petroleum Company should have been held a natural gas company subject to the provisions of the Natural Gas Act. That holding cannot by implication be construed as a ruling that automatically and thereby Phillips and all others similarly situated were exempted from the application of all state conservation orders. The Natural Gas Act was in the mind of the Court when it upheld the minimum price order in the *Cities Service case*. Therein you said:

> "Appellant does not contend that the orders conflict with the federal authority asserted by the Natural Gas Act, 52 Stat. 821, (1938), 15 U. S. C. Sec. 717, *et seq.*, (1948), 15 U. S. C. A. Sec. 717 *et seq.* The Federal Power Commission has not participated in these proceedings. Whether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that function to the states, is not before this Court.
>
> "We hold that on this record the Oklahoma Corporation Commission issued valid orders, and that the decision of the court below should be affirmed."
>
> 340 U. S. 179, 188, 189.

The affirmation of the original order in the *Cities Service* opinion made that order applicable to all interested in the subject field. If the present appellant by this appeal is exempted from the application thereof, such

would in fact constitute discrimination in favor of this appellant and against the other producers and purchasers in the field, as only Natural can benefit by the proceedings herein.

With full awareness of the Natural Gas Act and the powers delegated to the Power Commission, this Court upheld the basic order which is now being applied to this appellant. That order became final and so remained until the Commission issued an order which increased the minimum amount which must be realized for a thousand cubic feet of natural gas from 7¢ to 9.8262¢. The interval was more than six years. The *Phillips* decision did not come down until after that six year period had ended. It must be presumed that all others in the field have complied and the only person who would now obtain the benefit of a determination that such basic order cannot have effect because of the *Phillips* decision is the present appellant. Whatever may be said of the subsequent orders of the Commission fixing a minimum amount at which natural gas may be taken from the producing formation, the original price order was in effect during all of the period of time involved in this appeal.

We do not feel bound by the arguments made by Phillips in the *Phillips case* as to the conflict which exists in areas of regulation permissible to the Federal Power Commission and the state regulatory agencies. But we do say that for all of the reasons so well expressed in the

*Cities Service* opinion no conflict may be imagined or foretold for the purpose of striking down either of two compatible regulations.

> "But it is well settled that the gap referred to is that thought to exist at the time the Natural Gas Act was passed, and the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate commerce, *in the absence of conflicting federal regulation.*"
>
> *Phillips Petroleum Co. v. State of Wisconsin*, 347 U. S. 672, 684.

Some significance must be given to the fact that the Federal Power Commission has not intervened herein. It may be surmised that the agency charged with the enforcement of the Natural Gas Act does not believe the order in question, or its enforcement, conflicts with its own right to regulate.

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## II.

**The Commission's Order of Enforcement was made in accord with the evidence presented and does not violate the equal protection clause of the Fourteenth Amendment.**

It should be remembered that the basic order of the Commission (No. 19,415), fixes the minimum price at which gas may be taken from the formation (R. 134). Order No. 19,702 (R. 139-143), discloses that it was based upon an application of Phillips Petroleum Com-

pany for an order to vacate the basic price order (No. 19,514). Therein it is found:

That Phillips is delivering residue gas to Panhandle Eastern Pipe Line Company at a price of 4.67¢ per thousand cubic feet.

That Phillips transports daily some 80,000 gallons of liquid hydrocarbons extracted from the natural gas at the plant to another plant owned by Phillips where the liquid hydrocarbons are then refined and sold.

That the larger percentage of the liquid hydrocarbons extracted is 26-70 gasoline which has a current market value of between 5 and 5½¢ per gallon; that Phillips is now realizing from the natural gas produced the equivalent of 7¢ per thousand cubic feet at the wellhead; that Phillips did not see fit to introduce any evidence as to profits or losses from the production of natural gas in the field, and that since the application alleges hardship if forced to comply with the basic price order, it was incumbent upon Phillips to introduce proof showing wherein such hardship would occur. None of the evidence upon which Order No. 19,702 was issued is incorporated in the record of the case at bar.

Phillips took an appeal from the Commission's order to the Supreme Court of the State of Oklahoma, and upon affirmance thereof, appealed to this Court. In that appeal, *Phillips Petroleum Company* v. *State*, 340 U. S. 190, 192, this Court said:

"Appellant does not argue that the orders violated the Commerce Clause, Art. 1, Sec. 8, Cl. 3. In other respects, the appeal presents only minor variations of the issues raised by Cities Service. Phillips argues that it is not a purchaser but merely a producer; that unlike the situation in Cities Service, the order as applied to it lacks any connection with correlative rights, the interest of the public, monopolistic practices or discrimination. The distinction is without a difference: the connection between realized price and conservation applies to all production in the field, whether owners purchase from others or not and whether they own pipe lines or not. In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers or there is little point in regulating any.

"Phillips also relies heavily on the contention that the orders are unreasonably vague. *In substance, this argument is nothing more than that the determination by an integrated company of proceeds realized from gas at the wellhead involves complicated problems in cost accounting.* These problems are common to a host of valid regulations. There is nothing to indicate that Phillips will be penalized for reasonable and good faith efforts to solve them."

The order of the Commission involved in the present appeal (R. 81-87), specifically finds in paragraph 10 (R. 84-85), that Order No. 19,702 entered upon the application of Phillips Petroleum Company was not entered as a fieldwide order, but was entered as affecting a part thereof only, and on the application of an owner of a portion of the wells in the field, and was based on facts presented to the Commission in support of the special relief or exception which the applicant in that case

had requested. The Commission specifically found that in the Phillips hearing, Phillips did not see fit to introduce any evidence as to the profits or losses from the production of natural gas from the Guymon-Hugoton Field: that this Commission does not feel it is bound on Panoma's application to a determination of facts or any order entered on Phillips' application. It further found that it was not required in the present proceeding to vacate, modify or interpret Order No. 19,702.

Thus, the enforcement of the basic order (19,514), as to Phillips and as to Panoma was considered in separate proceedings upon entirely different evidence. The evidence produced at the hearing before the Commission upon the application of Phillips is not a part of the record. The evidence produced before the Commission upon application of Panoma has heretofore been related. We say that unquestionably such evidence fully supports the Commission's conclusion that Panoma was not receiving 7¢ per thousand cubic feet for its produced natural gas.

Thus, Natural desires this Court to entertain an appeal from a Commission vested with both judicial and legislative powers upon a fact question raised by Natural. This, this Court will not do. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 445.

Not only does Natural desire an adjudication upon a question of fact, it desires to compare two similar proceedings and the Commi. ion's rulings thereon without

incorporating into the record the evidence adduced in one of these proceedings.

In *Railway Express Agency, Inc.*, v. *New York*, 336 U. S. 106, 109, cited by appellants, this Court said:

> "We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom * * *."

The opinion in that case upon the question of equal protection is of no assistance to the Court in the case at bar. It was therein contended that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements, and that that was unequal treatment. The Court further said at page 110:

> "We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made, and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. * * * It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."

There can be no denial of equal protection if all parties are governed by the same rule. The rule prohibiting denial of equal protection may be invoked only upon satisfactory proof by pertinent evidence of different practices upon like but different sales. The fact that

the evidence is different in every proceeding to enforce the order does not in anywise affect the order's validity.

The Equal Protection Clause of the Constitution does not prohibit class legislation. It requires only that the classification be not arbitrary or unreasonable. Different factual situations not only deserve but require this treatment. *Nebbia* v. *The People of the State of New York*, 291 U. S. 502.

Judicial and administrative decisions resulting in unequal application to different persons is not a denial of equal protection unless it be apparent there was an intentional or purposeful discrimination.

In *Snowden* v. *Hughes*, 321 U. S. 1, 8, 9, 11, 12, this Court said:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, c.f., *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 86, 87, 36 S. Ct. 498, 501, 60 L. Ed. 899, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, 374, 6 S. Ct. 1064, 1072, 1073, 30 L. Ed. 220. But a discriminatory purpose is not presumed. *Tarrance* v. *State of Florida*, 188 U. S. 519, 520, 23 S. Ct. 402, 403, 47 L. Ed. 572; there must be a showing of 'clear and intentional discrimination'. *Gundling* v.

*City of Chicago*, 177 U. S. 183, 186, 20 S. Ct. 633, 635, 44 L. ed. 725: * * * Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. * * * But a mere showing that negroes were not included in a particular jury is not enough: there must be a showing of actual discrimination because of race * * *.

"Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic undervaluation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute.

* * * * * * * * *

"It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern.

"A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored."

See also: *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, *supra*, and *Phillips Petroleum Company v. State*, *supra*.

In the *Phillips case* this Court found no discrimination or violation of the Equal Protection Clause of the Constitution, and in answer to the Phillips contention

that the order as applied to it lacks any connection with correlative rights, this Court said, at page 192:

> "The distinction is without a difference: the connection between realized price and conservation applies to all production in the field, whether owners purchase from others or not, and whether they own pipe lines or not. In a field which constitutes a common reservior of gas, the Commission must be able to regulate the operations of all producers or there is little point in regulating any."

The Equal Protection Clause of the Constitution was raised by Natural and relied upon by Natural in the Commission when Natural attempted to prove that the order was discriminatory as to it, and that Panoma through sales of residue gas to it and sales of hydrocarbons extracted was actually receiving in excess of 7¢ per thousand cubic feet. When it developed that the proof offered did not sustain this contention, the Commission was required to go no further. It simply concluded upon the evidence that Panoma was selling gas for less than 7¢ per thousand cubic feet, and properly directed that Panoma desist from so doing and that it comply with the minimum price order heretofore approved by this Court.

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## CONCLUSION

The basic minimum price order of the Commission fixing the price which must be realized for all gas produced in the field at a minimum of 7¢ per thousand cubic

feet was approved by both the Supreme Court of the State of Oklahoma and this Court.

After the effective date of the Commission's order, and after approval thereof by this Court, it was judicially determined that certain companies purchasing gas in the field are natural gas companies and as such are subject to the jurisdiction of the Federal Power Commission. The Federal Power Commission has not attempted to fix the amount per thousand cubic feet which must be realized for gas taken from the field, or to prescribe a minimum wellhead price therefor. The Natural Gas Act by its specific terms does not apply to the production of natural gas.

Conservation of this valuable, depletable natural resource cannot be effectively accomplished without requiring a minimum price which will prevent waste, encourage drilling and development and protect the correlative rights of many owners in the reservoir. The State's right and power to enact laws and regulations for the protection of its natural resources has long been recognized and approved by this Court. This Court should now answer the question reserved in the *Phillips* decision by leaving the power and function of setting field prices of natural gas produced to the states who are best fitted to know and control matters of local interest. To say that natural gas is imbued with national interest is not sufficient. Every article regulated by the states is to some ex-

tent imbued with national interest. It is only when a serious conflict arises between the arms of the national government, on the one hand, and the state on the other, and the national government has preempted the field either by constitutional provisions or federal legislation that state legislation or regulations should be stricken down. In the case at bar neither of these conditions exist. This Court has clearly held the state regulation valid under the terms of the Constitution. The Natural Gas Act itself leaves to the state the control and regulation of the production of natural gas.

Certainly, if the basic minimum price order is valid, and it must now be conceded that it is, the enforcement of such valid order must be sustained. The evidence before the Commission clearly shows that Panoma was not receiving 7¢ per thousand cubic feet for gas produced by it. Natural defended the enforcement of this order by attempting to show compliance therewith. Compliance was not shown and the Commission properly so found. When the point was reached that made it clearly ascertainable that the order was not being complied with, the Commission was justified and required to so find, and order compliance.

By saying that the Commission found in a companion case that Phillips was complying with the order by receiving for the sale of gas and the hydrocarbons taken therefrom a price equal to 7¢ per thousand cubic

feet in no wise affects or controls the Commission s action in a separate hearing, between different parties, and upon entirely different evidence. Even if the Commission reached a conclusion that some other body or court would not have reached, the Equal Protection Clause of the Constitution is not violated. There is not present in the case any averment or intimation that the Commission purposefully or intentionally discriminated against Natural. The Constitution does not require situations which are different in fact or opinion to be treated in law as though they were the same.

The judgment of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

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